be used indiscriminately, unless it is used outside a settlement as defined in s. 105.

In *James'* case the Commissioner disclaimed any reliance on s. 108 to upset the arrangement but if he had not done so the question may have arisen whether an arrangement which was designed to escape s. 105 could nevertheless be caught by the wider provisions contained in s. 108. This was in fact one of the issues before the Court of Appeal in *McKay* v. *Commissioner of Inland Revenue* [1973] 1 N.Z.L.R. 592. This again involved a transaction with a family trust, which was able to be disregarded by the Commissioner but this time under s. 108. The transaction involved was the assignment of income from income-producing property to a trust in favour of the taxpayer's family. The assignment of the income was carefully made so as not to offend s. 105. Turner P., looking at the transaction in relation to its background, which showed a history of attempts by the taxpayer to reduce the incidence of taxation and frustrations of those attempts by the Commissioner, held that the assignment was another link in the same chain of events and therefore was an arrangement falling within s. 108 requirements as having "the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability to pay income tax". Consequently the assignment was able to be set aside by the Commissioner for tax purposes, even though if viewed in isolation from its history it may have been explainable as an ordinary family or business transaction. All members of the Court of Appeal agreed that even though the assignment did not infringe s. 105, that fact did not prevent a transaction in proper cases from being challenged under s. 108:

> The section [s. 105] is silent as to the assessment of income assigned for a period longer than seven years. The effect of this is, simply, that the assessment of such income is left to be governed, like any other assessment, by the general provisions of the Act. Prima facie, no doubt, the taxpayer may rely upon the Commissioner recognising the assignment, and issuing an assessment ignoring, as far as he is concerned, the income assigned; but s. 105 certainly does not prevent the Commissioner, in a proper case, from applying to such assignments the provisions of s. 108 (id., 600).

D. D. Twigg

TORTS

Negligence — general principles

In *Stephenson* v. *Waite Tilemann Ltd.* [1973] 1 N.Z.L.R. 152 the Court of Appeal had to consider the correct application of the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (Wagon Mound* (No. 1)) [1961] 1 A.C. 388. The action arose following an accident involving one of the employees of the respondent company. The appellant cut his hand as the result of a wire rope suddenly breaking loose near where he was working. He was admitted to hospital and although his swelling and feverish condition sub-

sided after a fairly short time, he developed symptoms of a very serious and debilitating kind which remained up to the date of the trial. It was established that the initial injury suffered by the appellant was an injury which was reasonably foreseeable by the respondent. The Court adopted the principles stated by Lord Parker in *Smith* v. *Leech Brain and Co. Ltd.* [1962] 2 Q.B. 405. In that case Lord Parker stated that the kind of damage which had to be foreseeable was the initial injury: the effects of that initial injury upon any latent susceptibility of the victim was relevant only to the extent of the damage and did not have to be foreseeable. He also decided that the decision in *Wagon Mound (No. 1)* had in no way affected the principle of the "egg-shell skull" cases i.e. that the wrongdoer must take the victim as he finds him.

Negligence — economic loss

In *Spartan Steel* v. *Martin and Co. Ltd.* [1973] 1 Q.B. 27 the English Court of Appeal considered the application of one of its own previous decisions in the case of *S.C.M. (U.K.) Ltd.* v. *Whittal and Son Ltd.* [1971] 1 Q.B. 337. The action arose out of the negligence of the defendant contractors who damaged an electric cable thereby cutting the direct source of power to the plaintiffs' factory. The plaintiffs were without electricity until the electricity board was able to repair the cable. Immediately the power supply had failed it became necessary to pour molten metal out of their furnace to prevent the metal solidifying and damaging the furnace. As the plaintiffs could not keep the metal at the correct temperature and complete the melt, the metal depreciated in value by £368 and they lost a profit from the sale of the metal from that melt of £400. There was also a claim for £1,767 which was the loss of profits on four melts which could have been carried out during the period that there was no electricity supply. On the basis of the decision in *S.C.M.* v. *Whittal* it was clear that there was liability for the £368 physical damages and the £400 loss on the first melt. The principal matter in contention was whether the loss on the four melts which could have been produced, constituted economic loss truly consequential on the physical damage. Lord Denning M. R. said that:

> At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable — saying that they are, or are not, too remote — they do it as matter of policy so as to limit the liability of the defendant.

He then considered the policy factors which he considered important and held there could be no recovery for the loss of profit on the four melts because that was economic loss independant of the physical damage.

Negligence — special relationships

In *Rees* v. *Sinclair* [1974] N.Z.L.R. 180 the Court of Appeal dismissed an action for professional negligence against a lawyer

in respect of his conduct as a barrister. Macarthur J. held that s. 13 Law Practitioners Act 1955 conferred on the New Zealand barrister the same immunity from action by his client as is conferred upon barristers in England. In *Rondel* v. *Worsley* [1969] 1 A.C. 191 the House of Lords held that the immunity from being sued for professional negligence extended not only to work done by counsel at the trial but also to the necessary pre-trial work for which counsel had been retained, such as drawing the pleadings and advising on evidence. In *Rees* v. *Sinclair* McCarthy P. held that the protection covers the barrister's conduct and management of a case in court and other work so intimately connected with the conduct of the case in court that it can be fairly said to be a preliminary decision affecting the way in which the case is to be conducted when it comes to a hearing. The Court of Appeal took the view that the immunity from suit, redefined in *Rondel* v. *Worsley,* arises not from the status of a barrister per se but from the work he does. The only relevant question in New Zealand is whether the barrister is doing barrister's work. If so the immunity exists. In *Rees* v. *Sinclair* it was held that when the defendant was retained by the plaintiff there was a contract of retainer embracing all aspects of the work which the defendant was instructed to perform. If there is a breach of contractual duty relating to solicitor's work there is a right of action. However, if there is a breach of his contractual duty relating to his capacity as a barrister there is no action. Public policy denies any claim by a plaintiff against the defendant in respect of any alleged negligence arising out of the defendant's conduct as counsel. It is of interest to note also that the Court of Appeal expressly left open the question whether there can be recovery of barristers' fees.

Negligence — damages

In *Bevan Investments Ltd.* v. *Blackhall and Struthers* (No. 2) [1973] 2 N.Z.L.R. 45 the court had to consider certain allegations of professional negligence against an architect and an engineer. The plaintiff company had contracted with the first defendant, an architect, for the design and construction of a building. The architect contracted with the second defendant, a structural engineer for the design and supervision of the structural aspects of the project. There was no contract between the plaintiff and second defendant. The trial judge, Beattie J., found negligence against both the architect and the engineer. He ruled that the plaintiff had a cause of action in tort against the engineer and an action in contract against the architect. The loss which the plaintiff sustained was to be measured by ascertaining the cost of reinstatement, i.e., the amount required to rectify the defects complained of and so provide the plaintiff with the equivalent of a building upon his land substantially in accordance with the contract. The costs of remedying the building and design defects were to be assessed when the defect was discovered and put right. Beattie J. held that any reward in respect of loss of profits would be assessable for income tax in the hands of the plaintiff.

Unlawful interference with another's business

The principle enunciated in *Emms* v. *Brad Lovett Ltd.* [1973] 1 N.Z.L.R. 282 was that a breach of a condition of a licence could constitute an unlawful interference with another's business. Both the plaintiff and the respondent held licences to operate mobile shops. The plaintiff alleged that the first respondent was continually stopping his van close to the plaintiff's mobile shop in breach of a local bylaw which provided that no travelling mobile shop should be stopped for the purpose of trading within 300 yards of any shop including a mobile shop. Perry J. held that the breach of this condition constituted an unlawful interference with the plaintiff's business.

Legislation

One of the consequences of the recent amendment to the Accident Compensation Act 1972 (Accident Compensation Amendment Act (No. 2) 1973) is the creation under s. 102 (b) of a supplementary scheme incorporating non-earners and persons not covered under any other scheme. This section extends cover to such persons subject however to certain limitations, such as that they are not entitled to periodic payments under the Act.

P. D. Garvan.

TRUSTS AND EQUITY

Charitable Trusts

In *In re Watson* [1973] 1 W.L.R. 1472 the question was whether or not a trust for the provision of money to aid the efforts of an eccentric religious writer was a charitable trust. The writings presented eccentric views many of which were old and discredited and the writings as a whole, which had no intrinsic value, served little purpose in extending knowledge of the Christian religion. The court however accepted that there was a religious tendency in the writings and as they were not subversive of all morality or religion this was sufficient to uphold the trusts as charitable.

The testatrix in *In re Cohen* [1973] 1 All E.R. 889 made provision in her will for the application of part of her residuary estate towards the benefit and maintenance of "any relative of mine whom my trustees shall consider to be in special need". Following the House of Lords decision in *Dingle* v. *Turner* [1972] A.C. 601, where it was confirmed that a trust for the relief of poverty creates an exception to the general requirement that a charitable trust must confer a public benefit, the trust in *Cohen's* case was held to be charitable even though the class to benefit was essentially private. Templeton J. considered that the object of this trust was to relieve poverty amongst a class and refused to accept the proposition that a relative "in special need" was not necessarily poor.